

August 17 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANAIN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 09-0322

PLAINS GRAINS LIMITED PARTNERSHIP, a Montana limited partnership; PLAINS GRAINS, INC., a Montana corporation; ROBERT E. LASSILA and EARLYNE A. LASSILA; KEVIN D. LASSILA and STEFFANI J. LASSILA; KERRY ANN (LASSILA) FRASER; DARYL E. LASSILA and LINDA K. LASSILA; DOROTHY LASSILA; DAN LASSILA; NANCY LASSILA BIRTWISTLE; CHRISTOPHER LASSILA; JOSEPH W. KANTOLA and MYRNA R. KANTOLA; KENT HOLTZ; HOLTZ FARMS; INC., a Montana corporation; MEADOWLARK FARMS, a Montana partnership; JON C. KANTOROWICZ and CHARLOTTE KANTOROWICZ; JAMES FELDMAN and COURTNEY FELDMAN; DAVID P. ROEHM and CLAIRE M. ROEHM; DENNIS N. WARD and LaLONNIE WARD; JANNY KINION-MAY; C LAZY J RANCH; CHARLES BUMGARNER and KARLA BUMGARNER; CARL W. MEHMKE and MARTHA MEHMKE; WALTER MEHMKE and ROBIN MEHMKE; LOUISIANA LAND & LIVESTOCK, LLC., a limited liability corporation; GWIN FAMILY TRUST, U/A DATED SEPTEMBER 20, 1991; FORDER LAND & CATTLE CO.; WAYNE W. FORDER and DOROTHY FORDER; CONN FORDER and JEANINE FORDER; ROBERT E. VIHINEN and PENNIE VIHINEN; VIOLET VIHINEN; ROBERT E. VIHINEN, TRUSTEE OF ELMER VIHINEN TRUST; JAYBE D. FLOYD and MICHAEL E. LUCKETT, TRUSTEES OF THE JAYBE D. FLOYD LIVING TRUST; ROBERT M. COLEMAN and HELEN A. COLEMAN; GARY OWEN and KAY OWEN; RICHARD W. DOHRMAN and ADELE B. DOHRMAN; CHARLES CHRISTENSEN and YULIYA CHRISTENSEN; WALKER S. SMITH, JR. and TAMMIE LYNNE SMITH; JEROME R. THILL; and MONTANA ENVIRONMENTAL INFORMATION CENTER, a Montana nonprofit public benefit corporation,

Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY, the governing body of the County of Cascade, acting by and through Peggy S. Beltrone, Lance Olson and Joe Briggs,

Appellees,

FILED

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STATE OF MONTANA

and

SOUTHERN MONTANA ELECTRIC GENERATION and
TRANSMISSION COOPERATIVE, INC.; the ESTATE OF
DUANE L. URQUHART; MARY URQUHART; SCOTT
URQUHART; and LINDA URQUHART,

Appellees/Cross-Appellants.

AFFIDAVIT OF ATTORNEY ROGER M. SULLIVAN

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STATE OF MONTANA)
) ss.
County of Flathead)

Roger M. Sullivan, being first duly sworn, deposes and states:

1. I am one of the attorneys for Appellants in this action.
2. Pursuant to the provisions of Rule 29, M.R.App.Civ.P., on behalf of Appellants I have filed an application for suspension of the rules. This affidavit is submitted in support of that application.
3. The Appellants previously brought this case before the Court through their Application for Writ of Supervisory Control. On April 29, 2009, the Court filed its Order, noting that:

Plains Grains contends that the impending construction of the HGS constitutes an urgency or emergency factor that renders the normal appeal process inadequate. We agree. The combination of the impending construction of HGS and the District Court's professed unwillingness to act render the appeal process inadequate. We also determine that a mistake of law by the District Court on Plains Grains' spot zoning claim would cause a gross injustice in light of the inadequacy of the normal appeal process. As a result, we deem it appropriate to exercise supervisory control over the District Court to a limited degree.

The District Court should resolve any remaining claims in Plains Grains' complaint and issue a final judgment.

(Order of April 29, 2009, pp. 4-5; Appendix Tab B, filed herewith.)

4. On May 27, 2009, the District Court issued its Order resolving all claims,

denying summary judgment to Plains Grains on all claims and granting summary judgment to the Board of County Commissioners (Commissioners) and Southern Montana Electric (SME) on all claims. (Tab B.) Final judgment was entered and this appeal follows.

5. On August 3, 2009, the Montana Department of Environmental Quality received from SME a request that its Air Quality Permit to operate HGS as a coal-fired power plant be revoked, on the basis that SME was now planning to build a natural gas-powered facility at HGS. (Appendix Tab O(1).) However, SME's General Manager Tim Gregori, described SME's move as a realignment of "our order of build-out" of generation and not necessarily the death of a coal-fired facility. (Appendix Tab P.)

6. Although to the best of the undersigned's knowledge no construction is presently occurring on the site, SME continues to pursue the permit required to construct an electrical generating facility on the site at issue. Prior to making its determination as to whether to issue the permit, DEQ must complete an environmental analysis pursuant to the provisions of the Montana Environmental Policy Act, §§ 75-1-101, *et seq.*, MCA. The form of that environmental review, whether an environmental assessment or a more extensive environmental impact statement, as well as the time within which the environmental review will be

completed, remain uncertain. However, SME has pressed DEQ to prepare the shorter, and more expedited, environmental assessment. (See SME's letter of July 31, 2009, to DEQ; Appendix Tab O(2).)

7. Moreover, SME has filed a cross-appeal in this proceeding, in which it is anticipated that SME will again argue that Appellants must request a stay and post a bond in order to pursue this appeal. (See SME's Response to Petition for Writ of Supervisory Control at pp. 12, 14.) In rejecting SME's argument that Appellants were foreclosed from pursuing the relief which they sought below, and that Appellants were required to seek a stay and post bond, the District Court stated:

A stay would require a bond that would cover the prospective damages to Defendants due to delayed construction. Both parties acknowledge such a bond could be astronomical, depending on this Court's assessment. Plaintiffs plainly and simply argue that as citizens, they have a right to access the courts for remedies and not have to assume such astronomical costs as a prerequisite to that right. This assumes, of course, that the other remedies sought (the Writs here) are appropriate. This Court agrees primarily because the rights afforded under Article II, Section 16 are worthless if they become dependent upon large expenditures of money.

(Order, pp 11-12; Appendix Tab A.)

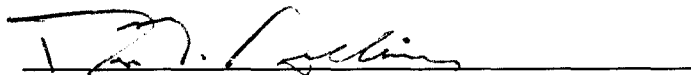
8. As noted, at present SME lacks the air quality permit which is needed to construct the natural gas-powered electrical generation facility. The undersigned affiant respectfully submits that the expeditious determination of this appeal would

support the Appellants' exercise of their right of access to the Courts, as guaranteed by the Montana Constitution, and render unnecessary the Court's consideration of SME's contention that Appellants must request a stay and post a prohibitively "astronomical" bond, with potential exposure to attendant damages.

9. Appellants, through counsel, request that the Court suspend its normal rules and provide for the Court's determination of this appeal proceeding in an expeditious manner.

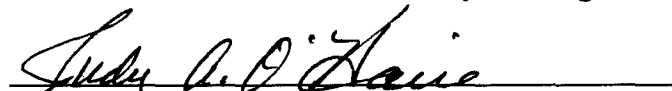
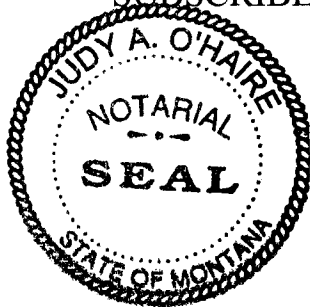
FURTHER AFFIANT SAYETH NOT.

Dated this 14th day of August, 2009.



Roger M. Sullivan
McGarvey, Heberling, Sullivan & McGarvey, PC
745 South Main
Kalispell MT 59901

SUBSCRIBED AND SWORN to before me this 14th day of August, 2009.



Notary Public for the State of Montana

Residing at Kalispell MT

My Commission Expires: *July 18, 2010*

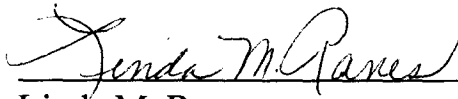
CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2009, a true and correct copy of the foregoing document has been served via U.S. First Class Mail upon the following:

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